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No. (1)

In The
Supreme Court of the United States

RENASANT BANK,

Petitioner,

v.

JAMES KIMBERLIN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 4 of the Federal Arbitration Act (FAA), 9 U.S.C. § 4, provides that "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement may petition any United States district court . . . for an order directing that such arbitration proceed . . . in accordance with the terms of the agreement." Section 16(a)(1)(B) of the FAA, 9 U.S.C. § 16(a)(1)(B), provides that "an appeal may be taken from an order" of a district court "denying a petition under section 4 of this title to order arbitration to proceed."

The questions presented in this case are substantively identical to those in another Sixth Circuit case concerning the FAA, *Arthur Andersen, LLP v. Carlisle*, No. 08-146, in which this Court recently granted certiorari. 129 S. Ct. 529 (Nov. 7, 2008). The questions presented are:

(1) Whether Section 16(a)(1)(B) of the FAA provides appellate jurisdiction over an appeal from an order denying a petition under Section 4 to compel arbitration of claims involving non-signatories to an arbitration agreement.

(2) Whether Section 4 of the FAA allows a district court to issue an order compelling arbitration of claims against a non-signatory to an arbitration agreement where the non-signatory can otherwise enforce the arbitration agreement under principles of contract or agency law, including equitable estoppel.

PARTIES TO THE PROCEEDING

The parties to this proceeding are the same as the parties to the proceeding in the United States Court of Appeals for the Sixth Circuit: petitioner Renasant Bank and respondent James Kimberlin.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Renasant Bank is a subsidiary of publicly-owned Renasant Corporation. No other publicly-owned corporation has a financial interest in the outcome of these proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Renasant Bank respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, dated September 25, 2008, is unofficially reported at 2008 WL 4428417, and is reproduced at Appendix A, 1a-7a.

The Order of the United States District Court for the Western District of Tennessee, Western Division, Affirming the Magistrate Judge's Order, dated July 25, 2007, is reproduced at Appendix B, 8a-16a. The Magistrate Judge's Order Denying Renasant Bank's Motion to Compel Arbitration, dated May 22, 2007, is reproduced at Appendix C, 17a-29a.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered its judgment and opinion on September 25, 2008. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is filed within 90 days of the entry of the opinion and judgment sought to be reviewed. This court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, provides:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue.

> Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Section 16 of the FAA, 9 U.S.C. § 16, provides in pertinent part:

> (a) An appeal may be taken from
>
> (1) an order
>
> ***
>
> (B) denying a petition under section 4 of this title to order arbitration to proceed[.]

STATEMENT OF THE CASE

On November 7, 2008, this Court granted a writ of certiorari to review the judgment of the United States

Court of Appeals for the Sixth Circuit in *Arthur Andersen, LLP v. Carlisle*, No. 08-146. 129 S. Ct. 529 (Nov. 7, 2008). The Sixth Circuit dismissed this case on exactly the same jurisdictional ground as *Carlisle*. It did so in an unpublished opinion that relied exclusively on its holding in *Carlisle*. Accordingly, this case presents precisely the same questions of statutory interpretation at issue in *Carlisle*.

Plaintiff James Kimberlin was jointly employed as an Investment Services Manager by Petitioner Renasant Bank and its wholly-owned subsidiary, Renasant Insurance, Inc. App. 2a-3a. Renasant Insurance operated as a legally separate entity to comply with a since-repealed Mississippi statute prohibiting banks from selling insurance or annuities.[1] For purposes of Kimberlin's employment, the two entities were indistinguishable. Kimberlin signed a "Dual Employment Contract" under which he was to market insurance and annuities offered *by* Renasant Bank *through* Renasant Insurance. App. 2a.

Kimberlin sued Petitioner Renasant Bank in the Circuit Court of Shelby County, Tennessee, alleging violations of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, and the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 201 *et seq.*, and raising various state law claims including breach of contract. Petitioner removed the action to federal court. App. 2a.

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[1] *See* Miss. Code Ann. § 83-17-229, Repealed by Laws 1999, Ch. 367, §1.

The Dual Employment Contract contains the following arbitration clause: "Any disputes hereunder or in connection with this Agreement or the conduct of the Licensed Representative [i.e., Kimberlin] shall be resolved by mandatory binding arbitration rather than litigation, pursuant to the commercial arbitration rules ('Arbitration Rules') of the American Arbitration Association ('AAA') then in effect." App. 18a. Renasant Insurance was listed as the counter-party in Kimberlin's Dual Employment Contract. Petitioner Renasant Bank also was a signatory, giving its consent to the dual employment arrangement, but was not listed as a party. App. 18a. When he brought this lawsuit, Kimberlin named only Petitioner Renasant Bank as a defendant. He omitted Renasant Insurance.

Petitioner Renasant Bank moved to compel arbitration under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, pursuant to the arbitration clause in Kimberlin's Dual Employment Contract. The magistrate judge denied the motion on grounds that Renasant Bank was not a party to the arbitration clause, and that Renasant Bank could not enforce the clause under an equitable estoppel theory. App. 22a-29a. That denial was affirmed by the district court on the same grounds. App. 11a-16a.[2] Petitioner timely

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[2] Importantly, both the magistrate and district court opinions accept the premise that the FAA sometimes permits arbitration in cases involving a non-signatory under an equitable estoppel theory. App. 11a-15a, 24a-25a ("[N]on-signatories may be bound to an arbitration agreement under ordinary contract and agency principles.") Neither opinion suggests, as the Sixth Circuit later held, App. 4a-7a, that the FAA's reference to a "written agreement" precludes the enforcement of arbitration by non-signatories under commonly-accepted contractual theories like

appealed this order to the Sixth Circuit pursuant to Section 16(a)(1)(B) of the FAA.

Petitioner Renasant Bank briefed the Sixth Circuit extensively on the factual grounds for enforcing the arbitration clause under an equitable estoppel theory. In his response brief, Kimberlin argued—for the first time in this litigation—that the reference to a "written agreement for arbitration" in Section 4 of the FAA prohibits the enforcement of arbitration agreements by non-parties on equitable estoppel grounds. Petitioner addressed this argument at length in its reply brief.

Ultimately, the Sixth Circuit did not address the merits of Petitioner Renasant Bank's equitable estoppel argument. Instead, it dismissed Petitioner's appeal for lack of appellate jurisdiction under Section 16(a)(1)(B) of the FAA. The Sixth Circuit reasoned that, because Petitioner was not a party to the "written agreement for arbitration," 9 U.S.C. § 4, in the Dual Employment Contract, it could not compel arbitration under Section 4 of the FAA.[3] The Court then collapsed its inquiry as to the merits under

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equitable estoppel. This further underscores the confusion among federal courts as to the meaning of the "written agreement" language of Section 4 of the FAA, discussed *infra*.

[3] For ease of reference, this petition uses the term "non-signatory" to refer to any person who is not a party to an arbitration agreement, since this is the designation most commonly used in relevant case law. To be clear, however, Petitioner Renasant Bank is a *signatory* to the Dual Employment Contract containing the arbitration clause. Renasant Bank signed the contract, giving its consent to the agreement between subsidiary Renasant Insurance and Kimberlin, but was not listed as a *party* to the contract.

Section 4 and its jurisdictional inquiry into one. It held that, because the "written agreement" language of Section 4 was not satisfied, the court of appeals lacked appellate jurisdiction under Section 16(a)(1)(B), which confers jurisdiction over appeals from the denial of motions to compel arbitration "under Section 4" of the FAA. App. 5a-7a.

The Sixth Circuit relied exclusively on its prior decision in *Carlisle v. Curtis, Mallet-Prevost, Colt & Mosle, LLP*, 521 F.3d 597 (6th Cir. 2008), as support for dismissal of this case. It observed that "[t]he procedural posture of the parties in *Carlisle* matches that of Kimberlin." App. 5a. It correctly found that the different statutory provisions at issue—Carlisle sought a stay of proceedings under Section 3 of the FAA, while Petitioner Renasant Bank sought to compel arbitration under Section 4—were immaterial to the jurisdictional question. App. 5a-6a.

The dismissal in this case relies entirely upon the decision in *Carlisle*. This Court granted certiorari to review that decision on November 7, 2008. *See Arthur Andersen, LLP v. Carlisle*, No. 08-146, 129 S. Ct. 529 (Nov. 7, 2008). As the Sixth Circuit indicated, the issues presented in both cases are materially identical. App. 5a-6a. Both dismissals turn solely on the proper interpretation of the "written agreement" language in Sections 3 and 4 of the FAA.

After issuing its opinion, the Sixth Circuit stayed the mandate pending filing of a petition for a writ of certiorari in this Court.

REASONS FOR GRANTING THE PETITION

The reasons to grant review of the Sixth Circuit's interpretation of the FAA are set forth in detail in the recently-granted petition for certiorari in *Arthur Andersen, LLP v. Carlisle*, No. 08-146.[4] They include a deep and persistent split among the courts of appeals and the need to correct a judgment that is at odds with the text and remedial purpose of the FAA. This is a follow-on case from the same court of appeals as *Carlisle*. It turns on the same question of statutory interpretation identified in the *Carlisle* petition. In the event this Court reverses the Sixth Circuit and remands *Carlisle*, it should likewise reverse and remand this case so that the court of appeals' erroneous dismissal can be corrected.

The only distinction between this case and *Carlisle* is that the former involves a motion by a non-signatory to compel arbitration under Section 4 of the FAA, while the latter involves a motion by a non-signatory to stay proceedings pending arbitration under Section 3. As the Sixth Circuit recognized in the *Kimberlin* opinion, App. 5a-6a, this distinction is immaterial to the statutory interpretation issue raised in both cases.

Courts generally interpret Sections 3 and 4 in tandem with one another. *See, e.g., Marie v. Allied Home Mtg. Corp.*, 402 F.3d 1, 13 (1st Cir. 2005), citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967); *see also Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 456-57 (2d Cir. 1995). Both

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[4] The Petition for Writ of Certiorari in *Carlisle* is unofficially reported at 2008 WL 3199724.

Section 3 and Section 4 refer to motions "under" a written agreement for arbitration. Section 16(a)(1)(A), in turn, confers appellate jurisdiction over a denial of a stay "under Section 3."[5] Section 16(a)(1)(B) confers appellate jurisdiction over denial of a motion to compel arbitration "under Section 4." The *Carlisle* petition correctly noted that Sections 3 and 4 are interpreted in tandem, and cited liberally to cases interpreting Section 4 of the FAA.

Both here and in *Carlisle*, the Sixth Circuit held that a non-signatory's motion to compel or stay does not arise "under" Section 3 or Section 4 because a non-signatory relying on equitable estoppel is not seeking arbitration "under" a written agreement. In both cases, the issue for review boils down to whether, by making reference to arbitration "under" a written agreement, Congress meant to preclude the enforcement of written arbitration agreements by non-signatories under common contractual theories like equitable estoppel.[6]

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[5] 9 U.S.C. § 3 ("If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration . . ."); 9 U.S.C. § 4 ("A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . .").

[6] Other courts of appeals have recognized that the interpretation of the "agreement in writing" language of Section 3 and the "written agreement" language of Section 4 pose a single interpretive question. *See, e.g., In re Universal Service Fund Telephone Billing Practice Litig.*, 428 F.3d 940, 943-45 (10th Cir. 2005) ("[W]hether Defendants are appealing from the district court's denial of a stay [under Section 3] or its refusal to compel arbitration [under Section 4], the plain language of the applicable

Because the issues for review are materially identical, all of the reasons for granting certiorari listed in the *Carlisle* petition are fully applicable here. A complete recitation would be needlessly duplicative. What follows is a brief summary.

I. The Courts of Appeals Are Divided Over Whether Section 16(a)(1)(B) Confers Appellate Jurisdiction To Review Denials Of Section 4 Motions Involving Non-Signatories.

In 1988, Congress amended the FAA by adding Sections 16(a)(1)(A) and (B), which permit immediate interlocutory appeal of orders denying motions to stay pending arbitration, 9 U.S.C. § 16(a)(1)(A), or to compel arbitration, 9 U.S.C. § 16(a)(1)(B). Since this addition, the courts of appeals have been split as to whether appellate jurisdiction lies where the party seeking to stay proceedings or compel arbitration is a non-party to the arbitration agreement.

The Second Circuit, Third Circuit, and Fifth Circuit all have held that Section 16(a)(1) confers interlocutory appellate jurisdiction where the district court denies a non-signatory's motion to stay under Section 3 or to compel arbitration under Section 4 on the basis of equitable estoppel or a similar theory of liability. *See Ross v. American Express Co.*, 478 F.3d 96, 100 (2d Cir. 2007) ("[W]hen a district court finds that a signatory to a written arbitration agreement is equitably

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jurisdictional statute mandates Defendants' prior reliance upon a *written agreement* to arbitrate as a condition precedent to our jurisdiction.")

estopped from avoiding arbitration with a non-signatory, the writing requirement of Section 16 of the FAA is met."); *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 212-13 (3d Cir. 2007) (appellate jurisdiction exists where non-signatory affiliate company made "prima facie" case of entitlement to enforce arbitration agreement); *Waste Management, Inc. v. Residuos Industriales Multiquim, S.A.*, 372 F.3d 339, 343 (5th Cir. 2004).

By contrast, the D.C. Circuit and the Tenth Circuit have held that appellate jurisdiction does not exist over denials of Section 3 and Section 4 motions involving non-signatories, even if the non-signatory might otherwise enforce the arbitration agreement under principles of contract law like equitable estoppel. *See DSMC Inc. v. Convera Corp.*, 349 F.3d 679, 682-84 (D.C. Cir. 2003) (Section 4 "requires that the motion to compel be based on an alleged failure to arbitrate under that written agreement. . . . Accordingly, we hold that this court has no jurisdiction under Section 16(a)(1)(B) to hear an appeal of an order denying a motion to compel arbitration between parties not under a written agreement to arbitrate."); *In re Universal Service Fund Telephone Billing Practice Litig.*, 428 F.3d 940, 943-45 (10th Cir. 2005) (non-signatory has no "right to an interlocutory appeal from the denial of a motion seeking to compel arbitration" under Section 4).

The First, Fourth, Eighth, and Eleventh Circuits have not expressly addressed the question of appellate jurisdiction under Section 16(a)(1), but have implied their agreement with the Second, Third, and Fifth Circuits by exercising appellate jurisdiction in cases involving denial of motions under Section 3 and

Section 4 involving non-signatories. *See, e.g., Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38, 44 (1st Cir. 2008); *Long v. Silver*, 248 F.3d 309 (4th Cir. 2001); *AgGrow Oils, LLC v. Nat'l Union Fire Ins. Co.*, 242 F.3d 777 (8th Cir. 2001); *Blinco v. Green Tree Serv., LLC*, 366 F.3d 1249 (11th Cir. 2004).

The petition in *Carlisle* elaborates further on the confusion regarding appellate review under Section 16(a)(1). Some circuits have internal inconsistencies in their case law addressing appellate review under 16(a)(1) of denial of motions to stay or compel by non-signatories. And where appellate jurisdiction is upheld, the reasons for doing so are varied and often inconsistent.

II. The Courts of Appeals Are Divided Over Whether Section 4 Permits The Enforcement Of Arbitration Agreements By Non-Signatories.

As discussed above, the Sixth Circuit's holding that it lacks appellate jurisdiction under Section 16 of the FAA is rooted in an interpretation of the substantive requirements of Section 4 (and in *Carlisle*, Section 3). App. 6a-7a. Briefly, the Sixth Circuit holds that a non-signatory relying on equitable estoppel to enforce an arbitration clause is not seeking to arbitrate "under a written agreement." Thus, although the Sixth Circuit's decision is ostensibly a dismissal for lack of appellate jurisdiction, it has the effect of establishing a *per se* rule that non-signatories cannot compel arbitration under Section 4, or stay proceedings under Section 3 of the FAA. The upshot is a split among the circuits, not only regarding appellate jurisdiction, but also as to the fundamental question of whether non-

signatories can *ever* enforce an arbitration agreement on common contractual grounds like equitable estoppel.

As discussed in the *Carlisle* petition, the Tenth Circuit and now the Sixth Circuit have held that Sections 3 and 4 do not apply as a matter of law to claims involving non-signatories. *See Universal Serv. Fund*, 428 F.3d at 942. Meanwhile, the D.C. Circuit in *DSMC* stated that it was withholding judgment whether an attempt to compel arbitration based on equitable estoppel "can ever succeed." 349 F.3d at 683. Under the D.C. Circuit's reasoning, it is difficult to see how one ever could. In any event, the D.C. Circuit was emphatic that "an effort to compel arbitration in such circumstances on the basis of equitable estoppel does not fall within Section 4 of the FAA." *Id.*

By contrast, the First, Fourth, Eighth, Ninth and Eleventh Circuits all have held that Section 3 and Section 4 apply to claims involving non-signatories where the non-signatory can show some basis—again, like equitable estoppel—for enforcement of the arbitration agreement. *See Restoration Pres. Masonry, Inc. v. Grove Europe Ltd.*, 325 F.3d 54, 62 n.2 (1st Cir. 2003); *Long*, 248 F.3d at 320; *AgGrow Oils*, 242 F.3d at 782 n. 5; *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006); *Blinco*, 400 F.3d at 1312.

Here again, the confusion runs deeper than a simple circuit split. As the *Carlisle* petition makes clear, several circuits, including the Fifth and Seventh, have unresolved intra-circuit conflicts over the availability of Section 3 and Section 4 to non-signatories.

III. The Sixth Circuit's Decisions Here And In *Carlisle* Are Erroneous.

The Sixth Circuit erred in dismissing this case for the same reasons it erred in dismissing *Carlisle*. First, it erred by conflating its jurisdictional analysis under Section 16(a)(1) with its analysis of the merits of Petitioner's motion to compel arbitration under Section 4. All that Section 16(a)(1)(B) requires is "an order . . . denying a petition under section 4 of this title to order arbitration to proceed." Nothing in the text of Section 16 permits the court of appeals to consider the ultimate merits of a Section 4 motion in making the threshold determination of jurisdiction. To hold otherwise would, among other things, convert every argument concerning the merits of a Section 4 motion into a non-waivable jurisdictional attack.

Second, the Sixth Circuit erred in determining that the "written agreement" language of Section 4—and in *Carlisle*, the substantively identical "agreement in writing" language of Section 3—bars the enforcement of an arbitration clause by a non-signatory. The stated purpose of the FAA is to place "an arbitration agreement . . . upon the same footing as other contracts, where it belongs." H. R. Rep. No. 68-96, A Bill to Validate Certain Agreements for Arbitration (1924). This Court has long held that whether a party may enforce an arbitration agreement is determined by ordinary principles of contract law. *See First Options v. Kaplan*, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.").

Put simply, Section 3 and Section 4 of the FAA require a written agreement. They do not necessarily require the party seeking arbitration be a signatory of that written agreement. There are literally hundreds of cases, stretching back over "hundreds of years of common law,"[7] holding that arbitration agreements can be enforced on the same grounds as any other contract, including enforcement by non-signatories based on equitable estoppel, agency law principles, guarantor and surety status, third party beneficiary status, contract assignment, and other theories. The two leading treatises on commercial arbitration both recognize equitable estoppel as a valid basis for enforcing arbitration agreements under the FAA. *See* 1 Thomas H. Oehmke, COMMERCIAL ARBITRATION § 11:1 (3d ed. 2005); DOMKE ON COMMERCIAL ARBITRATION § 13:8 (3d ed. 2008). The interpretation of Sections 3 and 4 of the FAA by the Sixth Circuit and other courts of appeals would undo all of that. More importantly, it would undercut the FAA's remedial purpose of placing arbitration agreements on equal footing with other contracts, by inserting into the FAA a requirement of signatory status that is absent from the statutory text.

RELIEF REQUESTED

Petitioner Renasant Bank respectfully submits that the questions presented for review in this petition are materially identical to those in *Arthur Andersen, LLP v. Carlisle*, No. 08-146. Counsel for Petitioner have conferred with counsel for the petitioner in *Carlisle* and believe that their merits brief and oral argument

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[7] *Comer*, 436 F.3d at 1104 n.10.

will adequately apprise the Court of all relevant issues. Accordingly, Petitioner respectfully requests that the Court grant this petition for a writ of certiorari and hold this case in abeyance pending its decision in *Carlisle*. In the event this Court elects to reverse the court of appeals' decision in *Carlisle* and remand, Renasant Bank asks that this case be remanded to the Sixth Circuit with an instruction substantively identical to that proposed in the *Carlisle* petition—that is, to reverse the district court's denial of Renasant Bank's Section 4 motion if it is able to demonstrate, as argued below, that (1) respondent's claims are within the scope of the arbitration clause; and (2) Petitioner can enforce the arbitration agreement under equitable estoppel principles.

Of course, to the extent the Court finds that additional briefing on these issues by Renasant Bank would be helpful, Petitioner would be happy to provide it.

CONCLUSION

The petition for a writ of certiorari should be granted. The judgment of the United States Court of Appeals for the Sixth Circuit should be reversed and remanded.

Respectfully submitted,

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